U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433

(985)-809-5173
(985) 893-7351 (FAX)

Issue Date: 12 September 2007

CASE NO.: 2007-LDA-00129

OWCP NO.: 02-146495

IN THE MATTER OF

F.T.,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Carrier

APPEARANCES:

Gary B. Pitts, Esq.,
On behalf of Claimant

John L. Schouest, Esq.
Brian White, Esq.
On behalf of Employer/Carrier

Before: CLEMENT J. KENINGTON
ADMINISTRATIVE LAW JUDGE

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) and its extension, the Defense Base Act, (DBA), 42

U.S.C. 1651 *et seq.* brought by F.T. (Claimant), against Service Employers International, Inc., (Employer), and Insurance Company of the State of Pennsylvania (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on June 6, 2007 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 18 exhibits which were admitted, including a report of Claimant's resume, pre-employment physical, employment agreement, job description, earnings statement, medical leave, notice of injury/illness, and claim for compensation; Employer's first report of injury, notice of controversion, denial of claim and answer to interrogatories; Claimant's medical records; AMA publication on hepatitis C infection; and medical information on hepatitis C from Dr. Russell Radoff.[1] Employer called 3 live witnesses including; Dr. Patricia Rosen, Dr. Mark Moeller, and vocational expert, William Quintanilla and introduced 20 exhibits which were admitted including Claimant's employment agreement, personnel and earnings records, various DOL forms (LS-18, 201, 202, 203, 207, 210).

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. At the time of Claimant's alleged injuries there existed an employer/employee relationship.

2. Employer was advised of the alleged injuries on March 3, 2006.

3. Employer filed a Notice of Controversion on March 28, 2006.

4. An informal conference was held on March 15, 2007.

5. Claimant's average weekly wage at the time of injury was $1,470.31.

[1] References to the transcript and exhibits are as follows: trial transcript-Tr.____; Claimant's exhibits-CX-____, p. ____; Employer exhibits-EX-____, p___; Administrative Law Judge exhibits-ALJX-____; p.____.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Fact of injury/illness from the zone of special danger.
2. Causation.
3. Nature and extent of injuries/illness.
4. Temporary total disability benefits.
5. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 48 year old male born and raised in Houston, Texas. Claimant has a GED and some limited college education at the College of the Mainland, Texas City. Before his employment with Employer, Claimant held a variety of jobs including cook, mail clerk, laborer, painter helper, grocery store clerk, and bus driver. As a bus driver, Claimant worked for three school districts in La Marque, Texas, over a 4 year period. (Tr. 13, 14).

Claimant commenced working as a bus driver for Employer in January, 2005, in Kuwait.2 He remained there for about a year after which he was transferred to Iraq. Claimant had no knee or Hepatitis C symptoms before his employment with Employer and passed a pre-employment physical without difficulty (Tr. 15, 16; Ex-3).3 Claimant has a history of illegal drug usage which allegedly ceased in 1978 when Claimant was 19 years old. (Tr. 17).

Claimant testified that he hurt his knee on three occasions while employed by Employer. The first injury occurred in January, 2006, while in flight to the U. S. from Iraq on leave for rest and recreation. On this flight turbulence hit the aircraft as Claimant was going to the restroom causing him to twist his body and right knee. Claimant felt a pop in his knee accompanied by pain which got worse over the next month. Claimant remained in the U. S. on leave for about two weeks before returning to Iraq during which time he never reported the knee injury or sought medical help. The second occasion allegedly occurred when he was in flight returning to Iraq and twisted his knee as he stepped into the aisle. The third incident allegedly occurred as

2 Claimant began his employment with Employer on January 15, 2005. (EX-1). Claimant was transferred from Kuwait to Iraq on January 27, 2006. (EX-2, p. 1; EX-12, p. 37).
3 Claimant was tested for Hepatitis A and not C. (EX-, p .9, 43, 44).

Claimant was retrieving luggage at the Dubai Airport. (Tr. 17, 18; CX-p.5; EX-12, p.50-53, Tr. 52, 56).

Despite severe pain and swelling Claimant admittedly never sought medical attention for his knee problems until February 9, 2006 when he went to Employer's Clinic. There is no record of this visit and no description of any knee problem until March 8, 2006 when he saw orthopedist, Dr. Moore. (EX-13, pp. 26, 27). In fact, Claimant underwent a physical exam by treating physician Dr. Russell Radoff on January 23, 2006 and never voiced or exhibited any apparent knee complaints or problems. (EX-13, pp. 16-19; Tr. 52-55). Claimant also underwent a second physical on February 21, 2006, and again never reported any knee problems. (Ex-13, p. 24). Claimant last worked for Employer on February 18, 2006. (EX-9). According to Claimant Employer sent Claimant home because of his knee, Hepatitis-C, and hypertension condition. (EX-12, pp. 58, 59). On March 27, 2006 Claimant underwent right knee surgery. (EX-13, p. 32) As of May 2006, Claimant concluded rehab of his right knee. (Tr. 57, 58).

Concerning Hepatitis-C, Claimant testified someone told him he had this condition in January, 2006, and that was caused by his blood coming into contact with another person's blood and that such had occurred on 4 occasions while employed by Employer. (Tr. 49, 50, 51). The first occasion occurred in March, 2005, when he was working at an Air Force Base in Kuwait transporting soldiers to an airplane. After the soldiers were aboard the plane, Claimant checked the bus, and touched one of the arm rests which had blood on it. The second occasion occurred in Claimant's living quarters when he pulled back the covers on his bed and came in contact with several drops of blood, the source of which Claimant was unable to determine. (Tr. 19-23). On another occasion he opened a patio door and noticed he had touched blood on the door handle. (Tr. 24). On another occasion in October, 2005, Claimant touched another's blood on either the steering wheel, console or hand break. (Tr. 26).

Claimant testified that after being diagnosed with Hepatitis-C he began to have headaches, feel tired, depressed, lose food, and lack energy. (Tr. 28). In addition, he found it hard to concentrate. (Tr. 29). Claimant saw psychiatrist, Dr. Diaz and Dr. Golioto for several months between 2000 and 2002. (Tr. 31-32) On his pre-employment physical Claimant was told he had a slightly elevated blood pressure. On cross, Claimant denied intravenous drug usage while overseas, but asserted he had superficial cuts from his elbows to his hands. (Tr. 46, 47).

On cross, Claimant was evasive when questioned about 4 previous back injuries while working for a construction company in Texas City, a janitor for HEB, a cook for Garfield Restaurant, a bus driver for Hertz for which he filed worker's compensation claims. Claimant also filed compensation claims against Marathon, and Amoco receiving money on only one claim. (Tr. 37).

B. Testimony of Dr. Patricia Rosen

Dr. Rosen, an internist and expert in toxicology and emergency medicine, reviewed Claimant's medical records and testified that Claimant's pre-employment physical tested for Hepatitis A and not Hepatitis C, and that is common for someone like Claimant to have no

symptoms and still test positive for Hepatitis-C. (Tr. 65, 66). Further the most common way to contract Hepatitis C (60% of the cases) was by intravenous drug use with increased incidence among those who use cocaine. (Tr. 68).

Dr. Rosen testified that in her professional opinion there was no way for Claimant to contract Hepatitis C by the blood contact Claimant described. Indeed, there has never has been a reported case of intact or non-intact skin contact. (Tr. 79). Claimant most likely contracted Hepatitis C through intravenous drug use. (Tr. 70). Hepatitis C is treated by Inter-feron and Fiboviron. Common reactions to Interferon include severe depression, insomnia; anxiety irritability decreased appetite, rash and impaired concentration. (Tr. 72, 73).

On cross, Dr. Rosen stated that it was very hard to get infected with Hepatitis–C from a cut that came in contact with infected blood. Rather, one has to inject it into ones body in order to get Hepatitis C or engage in indiscriminate sexual contact or cocaine use with only 10% coming from blood transfusions prior to the 1990's, and 5% at time of birth. (Tr. 68-78.). Claimant's hypertension was not work related, but was rather a hereditary disorder exacerbated by diet and lack of exercise. (Tr. 81). In essence, there was nothing in the record to indicate a worsening of Claimant's Hepatitis C due to work conditions. (Tr. 82; EX-17).

C. **Testimony of Dr. Mark Moeller**

Dr. Moeller, a psychiatrist, testified after examining Claimant he found no evidence of any mental condition which would impair Claimant's ability to work. Claimant's exhibited symptoms of paranoia and symptom magnification, but neither condition impaired his ability to work. (Tr. 83-93). Dr. Moeller also observed Claimant in the courtroom and saw Claimant demonstrate good concentration, persistence and pace and memory, and found no reason why Claimant should not be working. (Tr. 94). In essence, Claimant had no mental work related limitations. (Tr. 96; EX-14).

D. Testimony of William Quintanilla

Vocational Expert, Quintanilla testified that he prepared a vocational assessment and labor market survey on Claimant including an interview and a review of Claimant's medical record social history, educational background, and previous employment. (Tr. 97, 99). Mr. Quintanilla found Claimant to have worked as a semi-skilled or skilled driver to an un-skilled laborer and cook. Claimant reported occasional knee pain, but Claimant's record revealed no physical or mental work restriction. (Tr. 101, 102).

In the labor market survey, Mr. Quintanilla noted that Claimant had a Texas commercial driver's license and could perform a number of jobs in the sedentary to medium category including truck driver, gate guard, counter clerk, security guard, production assembler, parking lot attendant, order filler, deliverer/courier, cashier, order clerk, security clerk and surveillance system monitor paying up to $8.00 per hour. Mr. Quintanilla also identified specific job

openings including delivery driver, cashier or cook, security guard, and truck driver paying $6.00 to $19.23 per hour. (EX-15).

E. Claimant's Medical Records

On January 4, 2005, Claimant underwent and passed a pre-employment physical. (EX-13 pp. 6-13). On October 15, 2005, Claimant reported stress caused by finding blood on his sheets for which he was referred to an EAP. (EX 13, p. 14). On January 23, 2006, while states side, Claimant underwent a physical exam with normal results, except for blood testing which was positive for Hepatitis C. During this exam Claimant related no knee complaints. (EX-13, pp 16-19). Blood testing on January 31, 2006, confirmed the presence of Hepatitis C. (EX-13, p. 22).

On a March 8, 2006 office visit to Dr. Moore, Claimant reported he had injured his knee on February 9, 2006 when he was getting out of his airplane seat. Claimant allegedly had no pre-existing knee problems. When examined Claimant had mild antalgic gait and right knee effusion, tender medial joint line and positive McMurray testing. Dr. Moore assessed torn medial right knee meniscus. (EX-13, p. 26). A right knee MRI of March 13, 2006 confirmed tears in menisci, and mild to moderate joint effusion/synovitis. (EX-13, p. 28).

On March 27, 2006 Claimant underwent a right knee arthroscopy with partial medial and lateral meniscectomies and chondroplasty of the lateral femoral condyle. (EX-13, p. 32). On April 5, 2006, Dr. Siller started Claimant on physical therapy. (EX-13, p. 34). Therapy was concluded in May, 2006, with no need of further treatment. (Tr. 57, 58).4 On July 7, 2006, Claimant commenced treatment for Hepatitis C with Dr. Solowoy. (EX-13, p. 35).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is entitled to temporary total disability (TTD) from March 8, 2006 to May 26, 2006 due to a right knee injury which rendered him unable to work. Thereafter, he has been unable to work and entitled to continuing TTD due to profound fatigue and serious psychological problems associated with Hepatitis C, which he contracted by exposure to contaminated blood on three separated occasions in Kuwait, when his hand which had open cuts came in contact with infected blood.

Employer on the other hand contends Claimant never injured his right knee while employed by Employer, and when questioned about the three alleged incidents wherein he allegedly injured his right knee, admittedly never reported the alleged injuries until weeks after the injuries despite severe pain. When seen on two occasions by Dr. Radoff on January 23, 2006

4 Claimant testified that no doctor told him he could not work due to his knee condition. (EX-12, p .68). Claimant testified he could not work because of a lack of energy, inability to sleep, and difficulty concentrating. Claimant also testified he could only stand for one hour.

and February 21, 2006 voiced no knee complaints and exhibited no signs of any knee impairments. Indeed, Claimant did not seek any type of medical care for his knee until he saw Dr. Siller on March 8, 2006 which was 18 days after he ceased working for Employer. Further, Claimant failed to show any relationship between his contracting Hepatitis C and his work for Employer with Hepatitis usually contracted through IV drug use, indiscriminate sexual activity, or cocaine use with other possible but low exposure rates coming from untested blood or maternal child transmission. Claimant also failed to show any relationship between work, hypertension, and psychiatric or psychological problems or any work limitations associated with such conditions.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was impressed by Drs. Rosen and Moeller's testimony which was straightforward and candid. Dr. Rosen whose work in toxicology and internal medicine requires knowledge about the transmission of blood related diseases testified that Claimant could not have contracted Hepatitis C from any of the blood exposures he described at work. In fact, there have been no reported instances from the Center of Disease Control reports of 2001 of occurrences of Hepatitis from intact or non-intact skin contact. Rather, the most likely explanation for Claimant's contraction was from his admitted past IV Drug abuse even though it happened 40 years previous. Even with needle puncture there was only a 1.8% chance of contracting such a disease. Claimant's lack of prior symptoms is of no moment, because Claimant's reported symptoms were due to side effects of medication and not Hepatitis C itself. Dr. Moeller agreed essentially with Dr. Rosen, finding the most likely cause of Claimant's contraction being the past IV drug use. Rather than causing or aggravating Claimant's Hepatitis C condition, Employer by testing's Claimant's blood for obtaining a visa to Iraq just discovered the blood disorder.

Dr. Moeller who is board certified in psychiatry testified in a similar and forthright manner, stating after reviewing Claimant's medical records and observing his testimony that Claimant did not have any mental disability which would prevent him from working. Dr. Moeller opined Claimant was paranoid and a symptom magnifier, but such conditions were not work related.

Claimant veracity on the other hand was suspect due to his failure to even report his knee condition when seen by Dr. Radoff in January, and February, 2006. Indeed, Claimant as noted by Employer has a history of filing unmeritorious workers' compensation claims commencing in the 1980 and 1990's for multiple back injuries including three unsuccessful social security disability claims. When deposed about these claims, Claimant was evasive unable to recall the doctors who treated him or the specifics of any claim. When questioned about his use of cocaine Claimant was also evasive saying it was possible yet he could not say he had used it. Dr. Moeller found Claimant's deposition remarkable for the number of times Claimant claimed an inability to recall or know information in response to simple questions.

The record also reveals additional inconsistencies with Claimant: (1) denying on one hand exposure to hazardous substances while claiming on two separate occasions exposure to hazardous materials; (2) claiming prior testing for Hepatitis C while a pre-employment physical showed testing for Hepatitis A and not C; (3) claiming one occasion touching blood with his elbow up and not his hand; (4) telling Carrier he had not used illegal drugs when he had; (5) claiming only one prior back injury on his pre-employment physical instead of multiple back injuries; and (6) testifying about difficulty concentrating yet demonstrating a good ability to concentrate at the hearing.

C. Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D. C. Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway*

Stores, Inc., 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. *Wheatley v. Adler*, 407 F.2d 307, 313 (D. C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In the present case, Claimant testified that he injured his right knee while in transit to and from Kuwait, and also while lifting and carrying his luggage upstairs. While it is possible Claimant could have hurt his knee in this manner, and thus, met the requirement of a Section 20 (a) presumption because of subsequent evidence of a right knee derangement, I do not credit his assertion that it happened as claimed due to his failure to report the condition until several weeks later despite the present of intense pain. Indeed, Claimant saw Dr. Radoff on two separate occasions (January 23, 2006 and February 21, 2006) and never mentioned any knee problems. Indeed physical examinations on those dates revealed no abnormality which convinces me that any knee injury suffered by Claimant occurred after his employment with employer between

February 18, 2006 and March 8, 2006 when he first sought treatment for such a condition. Indeed for this and the other reasons listed above, I find Claimant's testimony to incredible.

Concerning the Hepatitis C condition, I find such a condition was pre-existing and not related to work conditions and credit Dr. Rosen's testimony it was not work related although detected while still employed. Even if I were to assume a remote possibility it could have been contracted by Claimant's assertion it had to do with exposure to contaminated blood, Dr. Rosen testimony rebutted the likelihood of such an occurrence. Indeed, I credit her and Dr. Moeller who testified the more likely explanation for Claimant's contraction was due to past IV drug abuse. While Claimant has had various severe symptoms of fatigue and depression, such have resulted from Claimant's treatment for Hepatitis C which came following his return to the U.S. Concerning Claimant's hypertension I credit Dr. Rosen that such a condition is heredity in nature and not work related and treatable by diet, exercise, and medication. In addition, such a condition was pre-existing and not caused or aggravated by work.

Regarding Claimant's depression, stress and other related alleged disorders, such conditions are related to Claimant's Hepatitis C treatment and do not result according to Dr. Moeller in any mental disability ability affecting Claimant's ability to work. Indeed, I credit Dr. Moeller and his assessment that Claimant is paranoid and a symptom magnifier and does not suffer from compensable psychiatric or psychological work related problem.

IV. CONCLUSION

Since Claimant failed to establish that he suffered a compensable injury, findings as to causation, nature and extent, maximum medical improvement, average weekly wage, Section 7, attorney's fees, penalties, and interest are unnecessary.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find no merit to the instant claim. Accordingly it is hereby dismissed.

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CLEMENT J. KENNINGTON
Administrative Law Judge